

1 witness under Federal Rule of Evidence 706.² This rule allows the court to appoint a neutral expert on
2 its own motion, or on the motion of any party. Fed. R. Evid. 706. The determination to appoint an
3 expert rests solely in the court's discretion and is to be informed by such factors as the complexity of
4 the matters to be determined and the court's need for a neutral, expert review. *See Ledford v. Sullivan*,
5 105 F.3d 354, 358-59 (7th Cir. 1997). The appointed expert is entitled to reasonable compensation,
6 and in a civil case the compensation is "paid by the parties in such proportion and at such time as the
7 court directs[.]" Fed.R.Evid. 706(b). However, where, as here, one of the parties is indigent, the court
8 may apportion all the cost to one side. *McKinney v. Anderson*, 924 F.2d 1500, 1510-11 (9th Cir.
9 1991), *vacated and remanded on other grounds*, 502 U.S. 903 (1991) (reasoning that allowing court-
10 appointed experts only when both sides are able to pay their respective shares would hinder a district
11 court from appointing an expert witness, "even when the expert would significantly help the court").

12 The appointment of experts in deliberate indifference cases is rare, and such requests should
13 be granted sparingly, particularly given the large volume of cases in which indigent prisoners allege
14 claims under the Eighth Amendment related to medical care, and the substantial expense defendants
15 may have to bear if courts were to appoint experts in such cases. *See, e.g., Hannah v. U.S.*, 523 F.3d
16 597 (5th Cir. 2008).

17 As noted above, Plaintiff does not specifically articulate what subjects the proposed expert will
18 provide testimony. Plaintiff's Eighth Amendment claim is predicated on the denial of Plaintiff's
19 request for orthopedic shoes, so presumably, the expert would be asked to evaluate and opine
20 regarding Plaintiff's lower extremity condition and the necessity, if any, of specialized footwear.

21 A prisoner can establish an Eighth Amendment violation arising from deficient medical care
22 if he can prove that prison officials were deliberately indifferent to a serious medical need. *Estelle v.*
23 *Gamble*, 429 U.S. 97, 104 (1976). A finding of deliberate indifference involves the examination of two
24 elements: "the seriousness of the prisoner's medical need and the nature of the defendant's responses
25 to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev'd on other grounds*, *WMX*

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28 ² The court assumes Defendants meant to reference the Federal Rules of Evidence and not the
Federal Rules of Civil Procedure.

1 *Tech., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997).

2 “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in
3 further significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin*, 974 F.2d at
4 1059 (quoting *Estelle*, 429 U.S. at 104). Examples of conditions that are “serious” in nature include
5 “an injury that a reasonable doctor or patient would find important and worthy of comment or
6 treatment; the presence of a medical condition that significantly affects an individual’s daily activities;
7 or the existence of chronic and substantial pain.” *Id.* at 1059-60; *see also Lopez v. Smith*, 203 F.3d
8 1122, 1131 (9th Cir. 2000) (quoting *McGuckin* and finding that inmate whose jaw was broken and
9 mouth was wired shut for several months demonstrated a serious medical need).

10 Plaintiff does not need a medical expert to determine that his leg or foot condition rises to the
11 level of a serious medical condition. According to Plaintiff’s Complaint, Dr. Donnelly has already
12 prescribed Plaintiff orthopedic shoes to help treat severe, chronic pain in his ankle, left knee, right hip,
13 and lower back. (*See* Doc. # 5.) This is presumably contained within Plaintiff’s medical records, and
14 Plaintiff may offer this as evidence that he suffers from a serious medical need.

15 If the medical needs are serious, Plaintiff must show that Defendants acted with deliberate
16 indifference to those needs. *Estelle*, 429 U.S. at 104. “Deliberate indifference is a high legal standard.”
17 *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). Deliberate indifference is present when a
18 prison official “knows of and disregards an excessive risk to inmate health or safety; the official must
19 both be aware of the facts which the inference could be drawn that a substantial risk of serious harm
20 exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *see also*
21 *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) (quoting *Farmer*, 511 U.S. at 858).

22 The deliberate indifference component of the Eighth Amendment inquiry is a subjective
23 inquiry. *See Farmer*, 511 U.S. at 834. Therefore, expert testimony is not required in determining
24 whether Defendants acted with deliberate indifference. An analysis of a defendant’s subjective state
25 of mind differs from the involved objective inquiry required for medical malpractice cases, which
26 delves into reasonable standards of medical care. *Ledford*, 105 F.3d at 359 (upholding district court’s
27 decision not to appoint an expert witness at trial of inmate’s deliberate indifference claims). In
28

1 contrast, the subjective inquiry required does not involve “probing, complex questions concerning
 2 medical diagnosis and judgment.” *Id.* Nor does it involve the evaluation of complex scientific
 3 evidence. *See McKinney*, 924 F.2d at 1511 (suggesting the district court consider appointing expert
 4 to evaluate complex scientific evidence such as the concentration levels of environmental tobacco
 5 smoke in the Carson City prison). Moreover, Plaintiff is not requesting an expert because one is needed
 6 to assist the court or fact finder. Rather, Plaintiff requests an expert to assist himself. This falls outside
 7 the the scope of appointment of an expert under Rule 706.

8 It appears the trier of fact will be able to evaluate Plaintiff’s objective medical need, as well
 9 as Defendants’ subjective state of mind with respect to Plaintiff’s medical treatment without the aid
 10 of an expert. Therefore, Plaintiff’s Motion for Court Appointed Expert Witness (Doc. # 26) is
 11 **DENIED.**

12 **2. Plaintiff’s Motion for Time Scheduling Order (Doc. # 30)**

13 Plaintiff asks the court to enter a scheduling order in this action, so that he may undertake
 14 discovery to oppose Defendants’ Motion for Summary Judgment. (Doc. # 30.) Defendants oppose
 15 Plaintiff’s motion, arguing that the proper method of requesting discovery is a motion pursuant to
 16 Federal Rule of Civil Procedure 56(d). (Doc. # 32.)³ In addition, Defendants argue that Plaintiff need
 17 not conduct discovery because the documentation Plaintiff asserts is essential to opposing the motion
 18 is available to him without the need for discovery. (*Id.*)

19 However, neither party cited the authority the court deems to be controlling, Local Rule 16-
 20 1(b), which provides in pertinent part:

21 In actions by or on behalf of inmates under 42 U.S.C. § 1983..., no discovery plan is
 22 required. In such cases, **a scheduling order shall be entered within thirty (30) days**
after the first defendant answers or otherwise appears.

23 LR 16-1(b) (emphasis added).

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 25 ³The court is required to liberally construe a *pro se* prisoner’s filings. *See Erickson v. Pardus*,
 26 551 U.S. 89, 94 (2007) (per curiam) *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987)
 27 Therefore, the court could construe Plaintiff’s motion as a request to conduct discovery under Rule
 28 56(d). However, “[p]ro se litigants must follow the same rules of procedure that govern other
 litigants.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). While the court could construe
 Plaintiff’s request as a motion under Rule 56(d), Plaintiff has not provided the required affidavit.
 Therefore, Plaintiff has not complied with the technical requirements necessary to defer consideration
 of a motion for summary judgment while discovery is completed.

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